IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JONATHAN WAYNE McMULLEN Petitioner.	2 CA-CR 2007-0415-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CR-01-199

Honorable Michael J. Brown, Judge

REVIEW GRANTED; RELIEF DENIED

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E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Jonathan McMullen pled guilty to reckless manslaughter, and the trial court sentenced him to a substantially aggravated 12.5-year term of imprisonment. In this petition for review of the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., McMullen argues he raised a myriad of colorable claims relating to the trial court's imposition of that prison term. Specifically, he contends that the sentencing court abused its discretion in relying on a flawed recommendation against probation from the probation department, that the court improperly sentenced McMullen as an adult, gave too much weight to one of the statutory aggravating factors it found, erroneously used the state's failure to provide treatment to McMullen as an aggravating factor, and improperly used McMullen's perceived lack of remorse as an aggravating factor. McMullen also contends that the state's failure to provide treatment subjects him to cruel and unusual punishment in violation of the Constitutions of the United States and Arizona. Because we conclude the trial court did not abuse its discretion in finding McMullen had not raised a colorable claim for post-conviction relief, we grant review of the petition but deny relief.

¶2 We view the record in the light most favorable to upholding the trial court's sentencing decision. *State v. Sasak*, 178 Ariz. 182, 189, 871 P.2d 729, 736 (App. 1993). When he was fourteen years old, the state charged McMullen with first-degree murder for the shooting death of his adoptive mother and two counts of attempted first-degree murder of his brother and adoptive father. McMullen agreed to plead guilty to reckless

manslaughter for causing the death of his mother in exchange for the dismissal of the remaining charges. *See* A.R.S. §§ 13-1103(A)(1).[1] The plea agreement provided McMullen could be sentenced to a prison term between the substantially mitigated term of three years and the substantially aggravated term of 12.5 years. The three-year term required a finding of at least two substantial mitigating factors and the 12.5-year term required a finding of at least two substantial aggravating factors. *See* A.R.S. § 13-702.01(A)(1), (B)(1).[2] The plea agreement also provided that probation was an available sentencing option.

¶3 During the change-of-plea hearing, McMullen established the factual basis for his conviction as follows. On the night of the shooting, he and a friend discussed taking McMullen's mother's car to Willcox. Because they lacked permission to do so and were afraid of getting caught, McMullen "decided to shoot the people at the house." The boys threw "something" at his mother's door and when she awoke and went into McMullen's room, he shot her multiple times. When McMullen's younger brother entered the room, McMullen shot him twice. He then shot his father once, and the rifle ran out of bullets. McMullen's father took the rifle and called 911. McMullen and his friend then left in one of the family's vehicles. Police officers found them several hours later in Willcox.

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[1]The material portions of § 13-1103 have not changed since McMullen committed his offense. *See* 1993 Ariz. Sess. Laws, ch. 255, § 18; *State v. Newton*, 200 Ariz. 1, ¶ 3, 21 P.3d 387, 388 (2001) (defendant must be sentenced under laws in effect at time of offense).

[2]The version of this statute in effect in 2001 provided the same ranges and necessary findings but allowed the court, rather than the trier of fact, to find aggravating and mitigating factors. *See* 1993 Ariz. Sess. Laws, ch. 255, § 12.

¶4 The court found the plea was supported by an adequate factual basis and was knowing, voluntary, and intelligent, but deferred accepting the plea until sentencing. The sentencing proceeding was then delayed for four years while the parties litigated various issues arising from two United States Supreme Court cases related to jury trials and sentencing, *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See State v. Brown*, 212 Ariz. 225, ¶¶ 6-10, 129 P.3d 947, 949-50 (2006) (last of four supreme court and appellate opinions resolving *Blakely* and *Apprendi* issues related to McMullen's sentencing).

¶5 Finally, on November 17, 2006, the trial court sentenced McMullen to the maximum, 12.5-year term of imprisonment. In July 2007, McMullen filed a petition for post-conviction relief pursuant to Rule 32, alleging various errors related to his sentencing. The trial court summarily dismissed his petition, finding he had raised no colorable claim. In his petition for review, McMullen raises the six sentencing issues summarized above.

¶6 We review the trial court's denial of a petition for post-conviction relief for an abuse of discretion. *State v. Saiers*, 196 Ariz. 20, ¶ 14, 992 P.2d 612, 616 (App. 1999). "A defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim which, if defendant's allegations are true, might have changed the outcome." *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990).

PRESENTENCE REPORT

¶7 Pursuant to A.R.S. § 13-914(A)(1), an adult probation officer prepares a presentence report for every person convicted of a felony who may be eligible for probation. McMullen contends that the recommendation against probation contained in that report "was improperly based solely on the nature of the crime, reflecting a complete disregard for the relevant Supreme Court guidelines and a usurpation of the trial court's sentencing discretion."

¶8 We review a sentence that is within the statutory range for an abuse of discretion. *State v. Calderon*, 171 Ariz. 12, 13, 827 P.2d 473, 474 (App. 1991). An abuse of discretion includes a failure to conduct a sufficient investigation into the facts relevant to sentencing. *Id.* "In reviewing the propriety of the trial judge's [sentencing] discretion, we must look to the general character of both the party convicted and the offense charged." *State v. Jerousek*, 121 Ariz. 420, 429, 590 P.2d 1366, 1375 (1979); *see State v. Carvajal*, 147 Ariz. 307, 310, 709 P.2d 1366, 1369 (App. 1985) ("[P]robation is granted or withheld almost purely as a matter of judicial discretion, based upon a complete knowledge of the background and traits of the defendant."); *see also State v. Smith*, 112 Ariz. 416, 419, 542 P.2d 1115, 1118 (1975) (probation is "matter of legislative grace" to be used when court determines within its sound discretion that defendant's rehabilitation can be accomplished without imprisonment).

¶9 As part of the presentence preparation process, § 13-914(B) provides that an "adult probation officer shall evaluate the needs of the offender and the offender's risk to the community, including the nature of the offense and criminal history of the offender." And, accordingly,

> [i]f the nature of the offense and the prior criminal history of the offender indicate that the offender should be included in an intensive probation program pursuant to supreme court guidelines for intensive probation, the adult probation officer may recommend to the court that the offender be granted intensive probation.

Id.

¶10 Here, the presentence report stated:

> [T]he case was staffed in person with the IPS [(Intensive Probation Supervision)] team and they determined that the defendant was not an appropriate candidate for their program; they recommended that he be committed to the State prison instead. In making this prison recommendation, the team considered the violent nature of the offense(s) and the loss of human life, despite any mitigating factors that would warrant a term of probation.

McMullen contends this recommendation was flawed because the probation officer failed to follow all the guidelines for determining eligibility for intensive probation set forth by the Arizona Supreme Court. *See* Ariz. Code Jud. Admin. § 6-202 (governing administration of intensive probation services). Those guidelines include numerous considerations not addressed by the presentence report in its account of the IPS team's recommendation.

¶11 A defendant generally has a duty to demonstrate to the sentencing judge that information in the presentence report is unreliable or inaccurate. *State v. Watton*, 164 Ariz. 323, 327-28, 793 P.2d 80, 84-85 (1990). Here, McMullen challenged portions of the report. But he did not object to the failure of the probation department to follow the supreme court's guidelines in writing the report. *See* Ariz. R. Crim. P. 26.8 (allowing objection and correction to presentence report); *State v. Walden*, 126 Ariz. 333, 336, 615 P.2d 11, 14 (App. 1980) (failure to assert objections to presentence report before sentencing renders them waived). Accordingly, we review this claim solely for fundamental error and resulting prejudice. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

¶12 As a threshold matter, the pertinent statutory language did not require the probation officer to consider any factors other than the nature of the offense and McMullen's prior criminal history before providing a recommendation to the court regarding his suitability for IPS. *See* § 13-914(B). However, § 6-202(H)(5), Ariz. Code Jud. Admin., does list a variety of additional factors a probation officer shall consider in that assessment:

> a. The offender's need for the structure, accountability, and close monitoring;
>
> b. The focus on treatment inherent in the intensive probation program;
>
> c. The benefits of the intensive probation program to the offender;
>
> d. Community safety;

e. The potential harm to the victim including the victim's attitude toward placing the offender on intensive probation;

f. Payment of restitution;

g. The probability the offender will remain at liberty without violating the law;

h. Performance of community restitution hours; and

i. Any other factors determined appropriate to the ends of justice and the safety of the community.

¶13 But even assuming that the regulations imposed a legal duty on the probation officer to expressly address these specific guidelines in its report, the record demonstrates that the court considered the factors articulated in the guidelines before sentencing McMullen. Indeed, the court thoroughly considered McMullen's juvenile status, his need for treatment, his mental health diagnoses, the availability of treatment, the safety of the community, the victims' wishes, and the possibility he might reoffend. And the court was not required to have a recommendation from the probation officer to place McMullen on IPS. *See State v. Woodruff*, 196 Ariz. 359, ¶¶ 5-6, 997 P.2d 544, 545 (App. 2000).

¶14 Moreover, McMullen has not shown that the court failed to consider any other factor from § 6-202(H)(5) that would have been beneficial to him. Nor does he "identify what information was lacking as a result of the alleged failure to investigate." *State v. Medina*, 193 Ariz. 504, 515, 975 P.2d 94, 105 (1999). Thus, even assuming the trial court erred in utilizing a presentence recommendation that inadequately addressed all of the guidelines set forth in § 6-202(H)(5), McMullen has not shown he suffered prejudice as a

result. He therefore has failed to sustain his burden of establishing the trial court abused its discretion by denying relief on this ground. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607-08.

¶15 In a related argument, McMullen emphasizes that the Code requires that adult probation should have administered a "standardized assessment" in order to determine whether he was a candidate for probation. *See* Ariz. Code Jud. Admin. § 6-202(H)(4). But he also failed to object to this alleged defect in the presentence report before sentencing, and thus, we again review only to determine whether he has shown error occurred that was fundamental and prejudicial. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. The "standardized assessment" is defined as "the state-approved tool to determine the offender's needs related to criminal behavior and propensity to re-offend." Ariz. Code Jud. Admin. § 6-202(A). The Code provides "[p]robation officers shall support any recommendation for the placement of an offender on intensive probation with the standardized assessment." Ariz. Code Jud. Admin. § 6-202(H)(3). Thus, the Code suggests the standardized assessment is only required when a probation officer is recommending intensive probation, rather than, as here, where the officer has recommended against probation.

¶16 But, even assuming the standardized assessment should have been conducted here, the probation officer gathered information about McMullen's past behavior in school, his lengthy history with Child Protective Services, the effect of the crime on the victims and the restitution implications, as well as voluminous psychological evaluation information.

Thus, even without a "standardized assessment," the probation officer fully evaluated McMullen's "needs related to criminal behavior and propensity to re-offend," the same needs designed to be measured by the standardized assessment. Ariz. Code Jud. Admin. § 6-202(A). McMullen has cited no authority for the proposition that, under such circumstances, the probation officer's failure to utilize the standardized assessment format would require a reversal of an offender's sentence. Nor has he shown any prejudice arising from the probation officer's failure to conduct a standardized assessment. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607-08. We find no fundamental error and no abuse of discretion in the court's denial of post-conviction relief on this ground.

SENTENCING DISCRETION

¶17 McMullen argues that the court had erred when it accepted the probation department's flawed recommendation that he be sentenced to a term of imprisonment. But we presume judges know and follow the law. *State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994). Thus, we presume the court knew McMullen's sentence was ultimately a matter of its discretion, regardless of the recommendation provided by the probation officer in the presentence report. *See State v. Jerousek*, 121 Ariz. 420, 429, 590 P.2d 1366, 1375 (1979); *State v. Carvajal*, 147 Ariz. 307, 309, 709 P.2d 1366, 1369 (App. 1985); *cf. State v. Pitts*, 26 Ariz. App. 390, 393, 548 P.2d 1202, 1205 (1976) (presentence report not required to contain sentencing recommendation). And McMullen has presented

no evidence the court failed to exercise its independent judgment in determining the sentence.

¶18 Before doing so, the court stated it had considered all of the following: the presentence report, testimony at the aggravation/mitigation hearing, the stipulation of aggravating factors, the sentencing memoranda, the reports and testimony of a psychologist and two psychiatrists, McMullen's statements to police after the shootings, McMullen's letters to the court, and the wishes of the victims. We presume the court gave the appropriate weight to each item, including the presentence report. *See State v. Watton*, 164 Ariz. 323, 327, 793 P.2d 80, 84 (1990). And in ruling on McMullen's petition for post-conviction relief, the trial court emphasized that it had "made an independent analysis of the factors enumerated in the sentencing document and with full consideration given to the mitigating factors decided that they did not warrant reducing the substantially aggravated sentence."

¶19 Moreover, McMullen stipulated to two aggravating factors, entitling the court to sentence him to the substantially aggravated term. *See* 1993 Ariz. Sess. Laws, ch. 255, § 12. And, by considering all the pertinent materials presented to it by the probation department and the parties, the trial court conducted an adequate investigation into the relevant factors before sentencing McMullen. *See State v. Sasak*, 178 Ariz. 182, 189, 871 P.2d 729, 736 (App. 1993) (sentencing court's investigation adequate when judge stated he had considered all letters, testimony, recommendations, and presentence report).

Accordingly, the trial court did not abuse its discretion when it rejected McMullen's post-conviction claim that the probation officer's recommendation usurped the court's sentencing discretion.

"PRESENCE OF A CHILD" AGGRAVATOR

¶20 McMullen argues the sentencing court erred when it gave weight to statutory aggravating circumstances inapplicable to the offense to which he pled guilty. Before the sentencing hearing, McMullen stipulated to the presence of two aggravating factors: that he had used a deadly weapon and that an immediate family member of the victim had suffered physical harm as the result of his conduct. *See* 1993 Ariz. Sess. Laws, ch. 255, § 12; 2001 Ariz. Sess. Laws, ch. 51, § 1. At sentencing, the court found as one of several additional aggravating circumstances that McMullen had committed the offense in the presence of a child.[3] *See* 2001 Ariz. Sess. Laws, ch. 51, § 1 (former A.R.S. § 13-702(C)(17)). McMullen argues this factor should have been given no weight because McMullen himself was a child at the time of the offense. He contends the intent behind the aggravating factor at issue "is to provide for increased punishment when adults in an adult domestic relationship commit domestic violence in the presence of a child," and the facts of this case do not fall within that situation.

¶21 Former A.R.S. § 13-702(C)(17) required the court to consider as an aggravating circumstance the fact that "[t]he offense was committed in the presence of a

[3]McMullen ultimately waived his right to have a jury decide aggravating factors.

child and any of the circumstances exist that are set forth in [A.R.S.] section 13-3601, subsection A." 2001 Ariz. Sess. Laws, ch. 51, § 1. Former § 13-3601(A) sets forth the enumerated offenses that are categorized as domestic violence when the defendant and the victim are related by marriage, blood, court order, or residence. 2001 Ariz. Sess. Laws, ch. 334, § 20. As the state correctly observes, nothing in the language of either former § 13-702(C)(17) or former § 13-3601(A) suggests a minor may not commit domestic violence, especially when, as here, the minor was lawfully tried as an adult. *See* 2001 Ariz. Sess. Laws, ch. 51, § 1; 2001 Ariz. Sess. Laws, ch. 334, § 20. The victim was McMullen's adoptive mother, and thus, they were related by court order; they also lived in the same residence. *See* 2001 Ariz. Sess. Laws, ch. 334, § 20. And the crime took place in the presence of McMullen's younger brother and two other minors.

¶22 On the other hand, neither manslaughter, the crime committed here, nor any other type of homicide, is expressly included in the enumerated list of crimes classified as domestic violence. *See id.* Although the language of former § 13-702(C)(17) does not provide that it applies to offenses outside those listed in former § 13-3601(A), neither does it necessarily limit its scope to such offenses. *See* 2001 Ariz. Sess. Laws, ch. 51, § 1. And, there would be little logic to increasing punishment when domestic violence, such as aggravated assault, is committed in front of a child but prohibiting such an increase when the child witnesses the violent act that causes the death of the victim. *See Black's Law Dictionary* 1564 (7th ed. 1999) (defining "domestic violence" as "an assault or other violent

act committed by one member of a household against another"); *see also State v. Moore*, 218 Ariz. 534, ¶ 5, 189 P.3d 1107, 1108 (App. 2008) (we interpret statutes in accordance with legislative intent).

¶23 But we need not decide the scope of former § 13-702(C)(17) and whether the legislature intended to apply that specific aggravating factor to offenders who are themselves children. Importantly, the court did not state it was finding this constituted an aggravating circumstance pursuant to former § 13-702(C)(17). And, McMullen overlooks that the trier of fact had the discretion to find in aggravation "[a]ny other factor [beyond those itemized] that the court deems appropriate to the ends of justice." 2001 Ariz. Sess. Laws, ch. 51, § 1 (former § 13-702(C)(18)). The fact that three children watched McMullen kill his adoptive mother is relevant to the circumstances of the crime and therefore the court would have been authorized to find it constituted an aggravating circumstance pursuant to former § 13-702(C)(18)—even if not appropriate under former § 13-702(C)(17). McMullen has not argued otherwise.[4] The trial court was therefore entitled under Arizona law to conclude

[4]McMullen argues in his reply to the state's response to his petition for review that the state's argument about the catch-all aggravator "is improper since no notice was given that this factor would be used and since the state stipulated that it would only assert two aggravating factors." But he has failed to develop this argument or support it with authority. Thus, he is not entitled to our review of the issue. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii); *State v. French*, 198 Ariz. 119, ¶ 9, 7 P.3d 128, 131 (App. 2000), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002). We note, however, once McMullen stipulated that two aggravating circumstances existed, the sentencing judge was permitted "to find and consider additional factors relevant to the imposition of a sentence up to the maximum prescribed [by] statute." *See State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). And our case law suggests the presentence report would have been

that McMullen's killing of his mother in the presence of three witnesses was a relevant aggravating factor. The trial court did not abuse its discretion in finding that McMullen had failed to raise a colorable claim on that basis.

CRUEL AND UNUSUAL PUNISHMENT

¶24 McMullen argues he has been "subjected to cruel and unusual punishment by being imprisoned in a system that fails to provide for his mental treatment and rehabilitation needs" and that the trial court abused its discretion when it denied relief on this claim. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This right to be free from excessive sanctions "prohibits punishments which, . . . 'involve the unnecessary and wanton infliction of pain,' or are grossly disproportionate to the severity of the crime." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), *quoting Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

¶25 McMullen does not argue his sentence is disproportionate, but rather, that the conditions of his confinement are cruel and unusual. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (deliberate indifference to prisoner's medical needs can constitute "'unnecessary and wanton infliction of pain'" prohibited by Eighth Amendment), *quoting Gregg*, 428 U.S. at 173. We question whether such a claim is cognizable under Rule 32.1. Such challenges

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sufficient notice of the additional aggravating circumstances the court found. *See State v. Jenkins*, 193 Ariz. 115, ¶ 21, 970 P.2d 947, 953 (App. 1998).

are generally brought against prison officials in civil rights proceedings. *See, e.g.*, *Wilson v. Seiter*, 501 U.S. 294, 296 (1991); *Rhodes*, 452 U.S. at 339-40; *Estelle*, 429 U.S. at 104-05.

¶26 McMullen insists, however, the claim was properly brought under Rule 32. But even assuming arguendo the Eighth Amendment applies the same duty to sentencing judges that it imposes on prison officials—namely, to "provide humane conditions of confinement [by] . . . ensur[ing] that inmates receive adequate food, clothing, shelter, and medical care," *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)—McMullen has not established he has been subjected to cruel and unusual punishment.

¶27 A prison official violates a prisoner's Eighth Amendment rights through a deprivation of humane conditions of confinement "only when two requirements are met." *Farmer*, 511 U.S. at 834. "First, the deprivation alleged must be, objectively, 'sufficiently serious.'" *Id.*, *quoting Wilson*, 501 U.S. at 298. In other words, "a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.'" *Id.*, *quoting Rhodes*, 452 U.S. at 347. Second, "a prison official must have a 'sufficiently culpable state of mind.'" *Id.*, *quoting Wilson*, 501 U.S. at 297. "In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Id.*, *quoting Wilson*, 501 U.S. at 302-03.

¶28 McMullen has simply not shown he suffered either an objectively serious deprivation of humane conditions or that the sentencing court acted with deliberate

indifference toward his health or safety. In denying post-conviction relief, the trial court stated, "Failure to provide rehabilitative treatment and services to a Defendant suffering from 'borderline intellectual functioning' and a 'possible Schizoid disorder' is not cruel and unusual punishment."[5]

¶29 Although McMullen was not diagnosed with a serious mental illness, the sentencing court found he likely would benefit from treatment "for [his] mental deficiencies." However, McMullen has cited no authority for the proposition that a prisoner's potential benefit from a service while incarcerated renders the deprivation of the service sufficiently serious to constitute an Eighth Amendment violation. Indeed, the pertinent legal authority presented by McMullen suggests that a greater showing would be required to reach that threshold. In *Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir.

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[5]The record supports the court's characterization of McMullen's diagnoses. A psychiatrist who had evaluated McMullen several times over the years since the shooting diagnosed McMullen with a schizoid personality disorder and testified at the aggravation/mitigation hearing that a person with that diagnosis "really has difficulty developing relationships with others. They are really detached." But he also testified that McMullen had done very well in jail, managing for the most part to avoid fights and conflicts. And, he added that the effect of his personality disorder is not "a potential for violence," but rather, "his life will [not] be rich with emotion. It will be kind of limited." The psychologist who had treated McMullen at various intervals from the time he had been in the foster care system through his incarceration disagreed with the schizoid personality diagnosis, stating in his report that McMullen "does have some features suggestive of social alienation and poor and underdeveloped social skills," but that in his opinion "some of the Schizoid features noted by [the psychiatrist] are more of an artifact of the jail context than of pervasive personality characteristics." It was within the province of the sentencing court to determine how much weight to give these somewhat conflicting evaluations in determining the appropriate sentence. *See State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993).

1994), the Ninth Circuit Court of Appeals characterized an inmate's "mild stress-related ailments a[s] the type of 'routine discomfort' that may result merely from incarceration" and held that a potential Eighth Amendment violation would exist only if the officials failed to treat a "'serious' medical need," which would be triggered by "an ailment of a greater magnitude."[6] Under that definition and on the record before us, neither McMullen's borderline intellectual functioning nor possible schizoid personality disorder qualifies as a medical need sufficiently serious that the deprivation of treatment would constitute an "'unnecessary and wanton infliction of pain.'" *Estelle*, 429 U.S. at 104, *quoting Gregg*, 428 U.S. at 173.

¶30 As we have already concluded, the court adequately investigated all options for sentencing, including treatment. Thus, we could hardly classify the court as acting with deliberate indifference to McMullen's health and safety needs. We find no abuse of discretion in the trial court's denial of post-conviction relief on McMullen's cruel and unusual punishment claim.[7]

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[6]The remaining cases McMullen relies on either do not involve claims for deprivation of medical care under the Eighth Amendment, *see Keenan v. Hall*, 83 F.3d 1083, 1090-91 (9th Cir. 1996); *Jordan v. Gardner*, 986 F.2d 1521, 1525-26 (9th Cir. 1993), or involve the claimant's conditions of arrest rather than incarceration, *see Gibson v. County of Washoe*, 290 F.3d 1175, 1182-83, 1187 (9th Cir. 2002). Consequently, they are inapplicable to the facts of this case.

[7]McMullen also argues "the Department of Corrections' action in shipping [him] to Indiana constitutes further infliction of cruel and unusual punishment by the state." But such a challenge to conditions of confinement that arise after sentence has been imposed are clearly not contemplated as a ground for post-conviction relief. *See, e.g.*, Ariz. R. Crim. P. 32.1(a), (c) (petitioner can challenge constitutionality of sentence or sentence exceeding

"THE MAN THAT YOU ARE"

¶31 McMullen argues the trial court improperly imposed sentence on him as the "man" he was in November 2006, rather than the fourteen-year-old boy who committed the offense in 2001. McMullen suggests a sentence on that basis would be improper because "a sentence [should] be based primarily on the offense and the offender's character at the time of the offense." He bases his argument entirely on the court's statement at sentencing that it was "obliged to sentence the man that you are."

¶32 Assuming arguendo that a trial court could err by placing undue weight on the offender's character at the time of sentencing rather than his nature at the time the offense was committed—in this case, occurring many years earlier—the comment, when placed in context, suggested no such focus here. Indeed, immediately before the court made that comment, it exhaustively addressed McMullen's behavioral development before he committed the offense. The court recounted McMullen's horrible childhood and characterized him as a victim of Child Protective Services and the foster care system. The court found

> the Department of Economic Security/Child Protective Services, through its bureaucratic bungling and incredible incompetence, as well as its blind insistence on following, without thought, a Return to Parent Policy has deprived the defendant of a chance to grow into a normal human being instead of what [he is], a

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legal limits); *see also Olim v. Wakinekona*, 461 U.S. 238, 251 (1983) (interstate transfer of inmate did not implicate Due Process Clause). Thus, we do not address the claim.

> man who has no emotional attachment or ability to bond with another human being.

Then the court stated to McMullen, "There is no satisfaction in this sentencing. You are what you are regardless of who caused it, and I am obliged to sentence the man that you are."

¶33 Thus, the sentencing court's use of the term "man" was more akin to the term "person," rather than as a contrast to the term "boy." And, in denying relief on McMullen's Rule 32 petition on this ground, the trial court clarified it had sentenced McMullen "for the crime he had committed when he was fourteen, but five years of incarceration had passed since then, and he was a 19 year old man at the time of the sentencing on November 17, 2006." McMullen points to no other evidence that the sentencing court had improperly sentenced him based on his age at the time of sentencing, and the trial court's explanation of its statement is reasonably supported in the record. *See State v. Boldrey*, 176 Ariz. 378, 380, 861 P.2d 663, 665 (App. 1993) (we affirm denial of post-conviction relief when trial court's finding on which denial based is supported by record); *cf. State v. Cordero*, 174 Ariz. 556, 560, 851 P.2d 855, 859 (App. 1992) (finding no error in excusing juror, in part, because record supported court's explanation). McMullen has not sustained his burden of establishing the trial court abused its discretion in summarily denying post-conviction relief on this ground.

LACK OF TREATMENT FACILITY

¶34 McMullen argues the failure of the state to provide secure treatment facilities was improperly used to aggravate his sentence. But the exchange between defense counsel and the court upon which this argument is based appears also to have been taken out of context.[8]

¶35 The record demonstrates the sentencing court actually considered the state's failure to provide secure treatment facilities as a mitigating circumstance. In fact, the parties so stipulated. And the court had specifically stated on the record that it considered this to be a factor in mitigation. Moreover, in its order denying post-conviction relief, the trial court clarified that it had not considered and relied on the state's failure to provide secure treatment facilities as an aggravating factor. McMullen has not established the trial court abused its discretion by denying relief on this basis.

LACK OF REMORSE

¶36 Finally, McMullen argues the trial court improperly imposed the aggravated prison term because of his perceived lack of remorse. He contends that even though the trial court reiterated at sentencing that, as the parties had stipulated, he had "demonstrated

[8]After the court pronounced sentence, McMullen's counsel attempted to clarify with the court whether it was its "determination that the aggravated term of imprisonment is appropriate in this case solely because of the failure of the State to provide adequate and proper treatment for secured treatment facilities that would address the needs of not only [McMullen], but also others in his position?" The court, appearing to misunderstand what defense counsel had said, went on to state, "Yes. I find it very much more likely that he was acting out in the manner he did because of the way he was raised and because C[hild] P[rotective] S[ervices] just utterly failed its responsibility in this case."

substantial and extensive remorse," which was a mitigating circumstance, the court regarded McMullen's father's perception that he lacked remorse as an aggravating circumstance. But the court did not list lack of remorse as an aggravating factor before sentencing McMullen. Rather, McMullen bases his argument entirely on the following statements of the court at sentencing:

> As to the finding of substantial and significant remorse, the record of your actions since the crime are [sic] silent with respect to conveying that remorse to the victims. Only the psychiatrists have been able to find that you feel remorse several years after the crime. There is no apology from you in the eyes of your adoptive father who has stood by you from the beginning and who has provided for you in every way he can, including . . . above all, by forgiving you for what you have done.

¶37 The sentencing court alone determines the weight to be given evidence offered in mitigation. *State v. Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d 355, 357 (App. 2003); *see also State v. Pena*, 209 Ariz. 503, ¶ 22, 104 P.3d 873, 879 (App. 2005) (describing sentencing judge "weighing and balancing aggravating and mitigating factors" to determine sentence within statutory range). The court's statements demonstrate it did not find McMullen felt no remorse, but simply that it may have given McMullen's remorse less weight because he had not expressed it to the victims. In denying McMullen's petition for post-conviction relief, the court stated, "The measure of weight to be given to any particular fact in mitigation is peculiarly within the discretion of the Court." Thus, the court did, in fact, consider McMullen's remorse a mitigating circumstance. We will not second-guess the

weight to be given that factor when the sentencing court had the benefit of witnessing McMullen's demeanor throughout the lengthy proceedings in this case. *See State v. Sasak*, 178 Ariz. 182, 189, 871 P.2d 729, 736 (App. 1993). Thus, the trial court did not abuse its discretion in finding McMullen had failed to state a colorable claim for relief on this issue.

¶38 For the foregoing reasons, we find the trial court did not abuse its discretion in denying relief on McMullen's Rule 32 petition, and therefore, we grant review but deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge